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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAMIE STREY and MARK BEGURSKI, wife and husband; and MILLENNIUM MOTORS, LLC, an Arizona Limited Liability Corporation, Plaintiffs/Appellants, v. HECTOR MONTOYA and MONTOYA AND MARQUEZ, PLLC, Defendants/Appellees.	2 CA-CV 2006-0221 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20052718

Honorable Charles V. Harrington, Judge

AFFIRMED

John D. Kaufmann — Tucson
Attorney for Plaintiffs/Appellants

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By William G. Fairbourn — Phoenix
Attorneys for Defendants/Appellees

B R A M M E R, Judge.

¶1 Appellants Jamie Strey, Mark Begurski, and Millennium Motors, LLC ("Begurski") appeal from the trial court's grant of summary judgment in favor of appellees Hector Montoya and the law firm of Montoya and Marquez, PLLC ("Montoya"). Begurski contends the trial court erred in finding he was unable to show causation in his legal malpractice claim against Montoya. Begurski claims either an affidavit he submitted or Montoya's refusal to answer questions under oath constitute sufficient evidence of causation to preclude summary judgment. Begurski also asserts that if we reverse the trial court's grant of summary judgment, we must also reverse the trial court's ruling on his motion to compel and "remand the issue to compel disclosure." Finding no error, we affirm.

Factual and Procedural Background

¶2 On appeal from a summary judgment, we view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. *Walk v. Ring*, 202 Ariz. 310, ¶ 3, 44 P.3d 990, 992 (2002). Begurski and Strey are the owners of Millennium Motors, a used car dealership in Tucson. On June 17, 2004, Maria Dominguez and Miguel Fragoso contacted Millennium and asked the dealership to purchase a Hummer H2 automobile on their behalf. Dominguez had previously purchased two other vehicles from Millennium.

¶3 Millennium purchased the H2 the next day, and Dominguez and Fragoso placed a $10,000 cash deposit with Millennium for the vehicle. The price of the H2 was approximately $59,000. The parties also negotiated for the trade-in of a 2003 Mercedes, and

Millennium offered Dominguez and Fragoso $27,000 for it without having seen it. After the Mercedes arrived at the dealership the next day, Begurski noticed it was actually a 2002 model, it was damaged, and although the vehicle's odometer showed 16,000 miles, the title to the vehicle indicated 75,000 miles. On June 25, after Dominguez and Fragoso paid Begurski an additional $20,000 by cashier's check, Millennium sold the H2 to them. Because of the confusion regarding the Mercedes, the trade-in was not credited toward the purchase price of the H2 at the time of sale, so the contract showed a balance due of $29,374.84. Millennium placed a lien in that amount on the H2.

¶4 Millennium kept the Mercedes in its possession as security. Begurski stated it "was not accepted as a trade-in . . . until . . . issues concerning title, mileage and damage were resolved." Millennium worked with a vehicle history reporter to investigate the discrepancies. In one affidavit Begurski stated the vehicle had been accepted as a trade-in "[o]n or before July 7," "the purchasers were given an additional $20,000 credit," and that the lien balance was therefore approximately $9,400. However, a more recent affidavit stated that Dominguez had not been given the $20,000 credit until Millennium sold the Mercedes on July 16, and therefore the lien amount was not reduced to $9,374 until that date.

¶5 Between July 1 and July 4, after a shooting incident in which passengers in the H2 were involved, law enforcement officers seized the vehicle after drugs were found in it. Dominguez contacted Montoya on July 4 and Montoya instructed her to state that she was only leasing the H2, and if the police had any additional questions, they should contact him

as her lawyer. On July 5, Dominguez told Montoya she owed $27,000 on the H2 and that she planned to speak with Begurski to see "if he can repo it back." Montoya agreed that, although law enforcement would probably not return the vehicle to her, they would return it to Begurski.

¶6 Begurski and Dominguez also had several telephone conversations after the H2 was seized. On July 7, Dominguez contacted Begurski and the two discussed recovering the vehicle from police.[1] Begurski, "worried about [his] interest being lost," told Dominguez "don't say [the lien is] $9,000. . . . [S]ay it's $29,000. . . . You make that mistake and then . . . they will take everything." These telephone conversations were all intercepted by law enforcement. In the forfeiture trial, a police detective also testified that Begurski had instructed Dominguez to tell Fragoso to state the amount owed on the H2 did not include any equity in the Mercedes.

¶7 On the same day Begurski was speaking to Dominguez, Begurski contacted Kim Jones of the Pima County Sheriff's Department concerning the H2. Begurski told Jones that Millennium had "a lien on the vehicle for 30k right now." He also faxed Jones a copy of the sales contract. On July 13, Begurski spoke with Jones again about the forfeiture proceedings. Begurski testified that sometime later in July he disclosed to law enforcement

[1]The Tucson Police Department's Innocent Owner Policy provides that if a car dealership sells a vehicle which is later seized, the city will return the dealer's equitable interest in the vehicle if the dealer can demonstrate an outstanding lien.

the acceptance of the Mercedes as a trade-in on July 16 and that his lien had therefore been reduced.

¶8 Begurski and Dominguez had a discussion on July 13 in which Dominguez stated Begurski could use "[her] lawyer" about the forfeiture, although Begurski wondered whether Montoya could "represent [both of them]." Dominguez then called Montoya and asked him to call Begurski. Dominguez later assured Begurski that Montoya could represent him because "[h]e's not representing [her]," and that Begurski could trust Montoya as he had "been [her] lawyer since 1986." And, Dominguez offered to pay Montoya to represent Begurski, although Begurski said he did not "have a problem paying him."

¶9 Begurski apparently first spoke with Montoya on July 14. The same day, Montoya told Dominguez he "can't represent anyone else" with respect to the H2. On July 16, Begurski sent a letter to Montoya asking him to represent Millennium in its case with the City for the seized H2. In this letter, Begurski stated his interest in the vehicle was $29,374.84. Begurski and Montoya entered into a fee agreement on July 20. Montoya admits his office telephoned Jones about the H2 and later wrote a letter to the Pima County Attorney Forfeiture Division to inquire about the necessary actions to recover it. This demand letter, dated July 29, written by an attorney in Montoya's office, did not name any specific lien amount.

¶10 Begurski was arrested on August 7, 2004, and was indicted along with Dominguez, Fragoso, Montoya, and numerous other individuals as part of a drug trafficking

organization designed to import illegal drugs from Mexico to the United States. Begurski was listed as part of "the Dominguez organization" and was charged with illegally conducting an enterprise, conspiracy to commit unlawful possession and/or transportation of marijuana, and fraudulent scheme and artifice. The state seized property and numerous vehicles belonging to Millennium Motors, and filed a complaint that this property, including the H2, was subject to forfeiture because it constituted the proceeds of various drug-related crimes or had been used to commit those crimes. Montoya was indicted on the same charges as Begurski, and also on three counts of money laundering unrelated to the H2.

¶11 Begurski thereafter petitioned for an order to show cause, and the trial court ruled that, although probable cause existed to seize Millennium Motors's property for forfeiture, the state had not proved by a preponderance of the evidence that Begurski had committed the alleged underlying offenses. The court also found that Begurski had an interest of $29,000 in the H2 until July 16 and had therefore not misrepresented that fact to Jones on July 7. This court affirmed that decision. *In re 2157 W. Jackalope Pl.*, No. 2 CA-CV 2005-0106 (memorandum decision filed July 13, 2006). Because of the result in the civil forfeiture case, the trial court in Begurski's criminal case concluded that collateral estoppel prevented Begurski from being prosecuted, and dismissed the charges against him with prejudice.

¶12 After the indictment and seizure, but before he ultimately prevailed in the forfeiture and criminal proceedings, Begurski sued Montoya for legal malpractice in

May 2005. Begurski's theory was that, because a conflict of interest existed between Millennium and Dominguez in the repossession of the H2, Montoya had committed malpractice in representing both parties, and, because of this representation, Begurski became "associated with the Dominguez criminal enterprise." Upon the advice of the lawyers representing him in the criminal case, Montoya refused to participate in a deposition in the malpractice action. The parties entered into a stipulation that Montoya would refuse to answer all questions and "the trial court may take whatever inferences the law allows when a party to civil litigation refuses to answer based upon his Fifth Amendment right to remain silent." Montoya filed a motion for summary judgment, arguing that no conflict existed between Dominguez and Begurski, and that there was "no causal link" between Montoya's actions and Begurski's alleged damages.

¶13 The trial court found that, "[a]lthough certain facts are in dispute, the evidence is uncontroverted that Begurski embarked upon the actions that led to his arrest and indictment before [his] representation by Montoya even began," citing statements Begurski had made to Dominguez and police between July 5 and July 13, before Montoya had begun representing him on July 20. The court stated that "[n]othing in the chronology of the case provides even the slightest evidence that Montoya's alleged conflict of interest, rather than Begurski's own independent choices, was the cause in fact of Begurski's subsequent arrest." The court also stated that an affidavit by Begurski's criminal attorney, Harold Higgins, was conclusory and insufficient to establish a material fact regarding causation. The court

concluded that "assuming *arguendo* that Montoya violated professional ethics and committed legal malpractice in representing Begurski and Dominguez, Begurski fails to provide any evidence that would allow a factfinder to conclude that such malpractice . . . caused [Begurski's] current legal problems." The court therefore granted Montoya's motion for summary judgment, and subsequently denied Begurski's motion for reconsideration. This appeal followed.

Discussion

¶14 A trial court properly grants summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c), 16 A.R.S., Pt. 2; *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court should grant a motion for summary judgment only "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶15 The elements of legal malpractice are:

> (1) the existence of an attorney-client relationship which imposes a duty on the attorney to exercise that degree of skill, care, and knowledge commonly exercised by members of the profession, (2) breach of that duty, (3) that such negligence was

> a proximate cause of resulting injury, and (4) the fact and extent of the injury.

Phillips v. Clancy, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986); *see also Woodruff v. Tomlin*, 593 F.2d 33, 39 (6th Cir. 1979) ("Negligence of an attorney in the investigation, trial, and appeal of his client's case is certainly improper practice in his professional capacity; it is malpractice. It is also malpractice for an attorney to represent parties with conflicting interests, without his disclosing all facts to his clients and obtaining their consent."); Restatement (Third) of The Law Governing Lawyers § 53 cmt. e (2000) ("Generally applicable principles of causation and damages apply in malpractice actions arising out of a nonlitigated matter.").

¶16 The trial court found that Begurski had produced insufficient evidence Montoya had caused Begurski to be prosecuted or the assets to be seized to defeat a motion for summary judgment. Under Begurski's theory of the case, he was required to produce evidence that, but for Montoya's representation, Begurski would not have been arrested and his property seized. *See Molever v. Roush*, 152 Ariz. 367, 371, 732 P.2d 1105, 1109 (App. 1986) (applying "but for" causation test in legal malpractice action).

¶17 Assuming that Begurski produced sufficient evidence of a conflict of interest, we nonetheless agree with the trial court that he marshalled insufficient evidence of causation to permit a conclusion that Montoya's representation led to Begurski's legal problems. It is undisputed that Begurski did not ask Montoya to represent him until July 16, and that the two did not have a written agreement regarding that representation until July 20. When we

examine the evidence in Begurski's criminal and forfeiture proceedings, however, it is clear that law enforcement was actually focused on Begurski's own actions, and that occurred before he was represented by Montoya.

¶18 For example, the grand jury testimony in Begurski's criminal proceeding shows law enforcement officials suspected Begurski had committed a criminal violation on July 7. One officer testified that, when Begurski spoke with Jones on that day, he told her that $29,000 was owed on the H2, but that based on intercepted calls "that had already happened" between Dominguez and Begurski, the actual amount was $9,000, and that they had inflated the amount owed "to make $20,000." Also, the grand jury heard about the July 7 intercepted telephone call between Begurski and Dominguez in which he had instructed her to state that $29,000, rather than $9,000, was owed on the H2. The grand jury later heard about the demand letter sent by Montoya's office, but the testimony in the criminal proceeding focused on Begurski's own behavior rather than his association with or representation by Montoya.

¶19 Similarly, the statement of facts submitted by the prosecutor in the forfeiture proceeding discussed four telephone calls between Dominguez and Begurski that had occurred between July 5 and 7. The prosecutor may even have concluded that Begurski had some knowledge about the underlying drug transactions that were the bulk of the criminal indictment as the statement of facts mentions Begurski's comments to Dominguez about the seizure. The statement of facts also details Begurski's suggestion to Dominguez on July 7 that she state the balance owed on the H2 was $29,000. And the prosecutor argued in the

forfeiture proceeding that Begurski "very clearly and very falsely both on July 7th and July 13th told the police that his lien amount was $29,000 rather than $9,000." The prosecutor focused on what Begurski had already told Jones because the demand letter from Montoya's office "did not state any particular lien amount."[2] Therefore, we agree with the trial court that, given the quantum of evidence required, a reasonable jury could not find it was Montoya's representation, rather than Begurski's own actions, that caused Begurski to be arrested and his property seized. Accordingly, the trial court did not err in granting summary judgment to Montoya. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶20 Begurski points to the result of the forfeiture action and argues he did nothing wrong but that it was Montoya who had engaged in illegal activity. He states there was "sufficient evidence in the record to support [his] claim to . . . Jones . . . on July 7, 2004 that his lien on the [H2] was over $29,000 and statement to Dominguez on the same date telling her to be truthful about the amount of the lien." Also, Begurski argues "[n]owhere in the record is there any support for [Montoya's] claim that Dominguez and Begurski agreed to misrepresent Millennium Motors' lien." But whether Begurski did anything wrong was not

[2]Begurski relies heavily on the prosecutor's somewhat cryptic comment that "Begurski's feelings prior to accepting representation from co-defendant Montoya . . . are irrelevant. It is merely the fact that the representation occurred and a relationship was started . . . that was relevant and presented to the Grand Jury." We cannot say that this statement is sufficient evidence for a reasonable jury to conclude that, but for Montoya's representation, Begurski's legal problems would not have occurred. We also note that this statement, made in response to a motion to dismiss, was preceded by the prosecutor's discussion of Begurski's "very clear[] and very false[]" comments to Jones.

the question before the trial court in the legal malpractice action. The proper question on the issue of causation was why the state instituted forfeiture and criminal proceedings against Begurski, not whether those proceedings were improper. The outcome of the proceedings, therefore, is simply not relevant.

¶21 Begurski produced two affidavits from Harold Higgins, his criminal defense attorney, on the causation issue. Higgins's legal conclusion was that "Montoya's use of Millennium Motors to recover Dominguez'[s] interest to the Hummer H2 . . . caused and resulted in criminal charges and civil forfeiture claims." Higgins pointed to the conversations between Dominguez and Montoya from July 4 through 7 and their discussion about recovering the H2, that Montoya should represent Millennium, and that Dominguez could pay for the representation. Higgins stated Montoya had either denied or failed to realize that, in advising Begurski, it would appear that Begurski was attempting to recover the proceeds from a racketeering offense. Further, Higgins stated that Begurski hiring Montoya had "put law enforcement on notice that Millennium Motors was hiring [Dominguez's] attorney to recover [Dominguez's] interest in a racketeering proceed." Higgins also noted that all three charges against Begurski name Montoya as a codefendant, and pointed to the prosecutor's statement that Montoya's representation was relevant and presented to the grand jury.

¶22 We agree with the trial court, however, that this affidavit was insufficient to defeat a motion for summary judgment. Higgins's legal conclusion that it was Montoya's representation that had caused Begurski's legal woes does not create a material issue of disputed fact that would preclude summary judgment. *See Wachovia Bank v. Fed. Reserve Bank of Richmond*, 338 F.3d 318, 323 n. 5 (4th Cir. 2003) (legal conclusion, "unsupported by any evidence . . . carries no weight for purposes of summary judgment"). Because Higgins cannot point to any specific facts in either the criminal or forfeiture proceedings, other than one fairly innocuous statement by a prosecutor, indicating it had been Montoya's representation that had attracted law enforcement's attention and had caused Begurski's legal problems, his legal opinion is conclusory as well as speculative. *See Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) ("[A]ffidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment."); *Badia v. City of Casa Grande*, 195 Ariz. 349, ¶ 29, 988 P.2d 134, 142 (App. 1999) ("Sheer speculation is insufficient to establish the necessary element of proximate cause or to defeat summary judgment.").

¶23 Begurski also contends the trial court "failed to draw appropriate adverse inferences from . . . Montoya's invocation of his privilege against self incrimination." We cannot conclude, however, whether Begurski is correct in stating the court "did not take any negative inferences based upon that refusal [to testify]," because the court did not address this point in its ruling. Regardless, Begurski fails to cite any authority requiring a trial court

to draw adverse inferences, and only argues "courts are permitted to draw adverse negative inferences." *See Buzard v. Griffin*, 89 Ariz. 42, 48, 358 P.2d 155, 158 (1960); *Montoya v. Superior Court*, 173 Ariz. 129, 131, 840 P.2d 305, 307 (App. 1992). Furthermore, nothing in the stipulation between Begurski and Montoya required the court to draw adverse inferences; that agreement merely stated "the trial court may take whatever inferences the law allows." Assuming the court drew no adverse inferences, we cannot find it erred in not doing something it was not required to do.

Disposition

¶24 We affirm the trial court's grant of summary judgment in favor of Montoya. Because of this result, we need not address the trial court's denial of Begurski's motion to compel.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge